

Construction contractors who make improvements to real estate by taking materials off the market and permanently affixing them to real estate owe Use Tax on the cost price of those materials. See 86 Ill. Adm. Code 130.2075. (This is a GIL).

December 20, 2000

Dear Xxxxx:

This letter is in response to your letter received by our office on September 19, 2000. We apologize for the delay in responding to your inquiry. The nature of your letter and the information you have provided require that we respond with a General Information Letter, which is designed to provide general information, is not a statement of Department policy and is not binding on the Department. See 2 Ill. Adm. Code 1200.120 subsections (b) and (c), which can be found at <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

In your letter, you have stated and made inquiry as follows:

The Illinois Department of Revenue's opinion is requested in regard to the Illinois sales and use tax treatment of the following six examples:

Example 1

Company #1 has a grain bin that needs servicing in Illinois. Company A's crane and operator drive to the site in a truck-mounted crane and set up in the area directed. Crane operator and crane lift several pieces to the top of the grain elevator. These pieces were rigged for lifting by Company #1's personnel. Crane and operator would fold up and return to STATE.

Example 2

Company #2 erects cell phone towers. Company A's crane and operator, along with three tractors, trailers and drivers to haul counterweight for the crane, travel from STATE to tower site in Illinois. Company A's operator and drivers set up crane and ready it for the pick(s). Company #2's personnel rig tower sections. Company A's crane and operator lifts pieces of tower section and holds them in place until they can be secured by Company #2's riggers. Company A's crane, operator, tractors, trailers and drivers fold up and return the crane to STATE at the completion of the job.

Example 3

Company #3 builds steel structures. Company A's crane is trailered to the site in Illinois from STATE. Crane is set up on site, but is mobile about the job site as the crane is described as a mobile rough terrain crane. Company A's operator makes daily trips to the site for a two-week period, crane remains on site. Crane and operator perform the following functions while on site:

- Unloading beams and trusses from various carriers' trailers
- Hoisting beams in place
- Lifting various supplies to the top of the structure that are used by Company #3's riggers
- Hoisting trusses in place

All rigging is performed by Company #3's personnel.

Example 4

Company #4 owns equipment that needs to be unloaded from a barge on the Mississippi River. Company A's crane, operator, tractors, trailers and drivers (to haul counterweight) are dispatched to the Illinois site from STATE. Company A's crane is set up and readied for the pick by Company A's operator and crew. Company A's personnel rig the piece. The pick is performed and then the crane is folded up and returned to STATE.

Example 5

Company #5 builds apartment complexes. Company A's mobile crane and operator are dispatched to the site in Illinois and set up by the operator. Crane and operator lift and set trusses at the direction of Company #5 personnel. Company A's crane and operator fold up and return to STATE after completion of the job.

Example 6

Company #6 builds pre-fabricated houses. A customer of Company #6 wishes to have a house set on his property in Illinois. Company #6 contracts with Company A to set the house. Company A's mobile crane, operator and tractors, trailers and drivers, carrying two loads of counterweight, are dispatched to home site in Illinois from STATE. The crane is readied at the site by Company A's personnel. The house arrives on a third party carrier's trailer. The house is set by Company A's crane and operator with Company #6's personnel doing the rigging. After the house is set, crane is folded up and returned to STATE.

QUESTIONS

1. For each of the above Examples 1-6, are the charges by Company A to it's customer (for performing the activities described) subject to Illinois sales or use tax? If yes, what law, regulations, etc., apply to these activities?
2. Is Company A liable for sales and use tax on any of the trucks, trailers, tractors and equipment (e.g., cranes) it uses in performing these activities in Illinois? If yes, what law, regulations, etc. apply? Also, if the answer is yes, would Illinois allow credit for STATE sales or use taxes properly paid by Company A? Would

Illinois also allow credit for STATE local sales and use taxes (e.g., county tax) properly paid?

3. A crane used in Illinois in Examples #1-6 was purchased in STATE without tax because it was intended to be used solely for rental purposes. STATE sales tax is charged on the rent of the crane in STATE.

If this crane is subject to Illinois use tax, will credit be allowed for the STATE sales tax charged by Company A on rent of the crane in STATE? Also, if the crane is subject to Illinois use tax, is the use tax computed on the original cost of the crane, fair market value at the time of use in Illinois, or some other amount?

4. Do the activities by Company A create nexus in Illinois for 1) sales and use taxes, and 2) corporation taxes?
5. Is Company A required to withhold Illinois income taxes from the wages it pays to its employees for working in Illinois as described in Examples 1-6?

If you have any questions regarding this request, please call me at (608) 240-2489.

This letter responds to your inquiry regarding sales and use tax questions. The Income Tax Division of our office will respond to your Income Tax questions (question numbers 4 and 5) in a separate letter. Your letter is unclear whether Company A in your examples is contracting for services and is using its equipment in this State or is merely leasing that equipment (with operator) to others in this State. We hope that the following information is helpful.

If all Company A is doing in your examples is bringing its equipment into this State in order to lift equipment or materials for its customers, such as construction contractors or other servicemen, then Company A would not incur any sales or use tax on its charges to its customers for that service. However, it would incur Use Tax on the use, in Illinois, of its equipment used in performing these activities.

If Company A is leasing that equipment to its customer, then it would also incur no sales or use tax on its charges to its customers for that service. However, Company A would incur use tax liability on its use of its equipment in this State. In Illinois, lessors of tangible personal property under a true lease, except for automobiles leased for terms of one year or less, are considered to be the end users of the property to be leased. See the enclosed copies of 86 Ill. Adm. Code 130.220 and 130.2010.

If Company A is contractually required to purchase tangible personal property for incorporation into real estate, then it would be acting as a construction contractor. In Illinois, construction contractors are deemed end users of tangible personal property purchased for incorporation into real property. As end users of such tangible personal property, contractors incur Use Tax liability for such purchases based upon the cost price of the tangible personal property. See the enclosed copies of 86 Ill. Adm. Code 130.1940 and 86 Ill. Adm. Code 130.2075. Persons from other states who act as construction contractors in Illinois by permanently affixing tangible personal property to real estate owe Illinois Use Tax on the cost price of the tangible personal property affixed to that real estate.

The Illinois Use Tax Act provides, that in order to prevent multi-state taxation, the Use Tax does not apply to the use, in Illinois, of tangible personal property acquired outside of this State and caused to be brought into this State by a person who has already paid a tax in another state in

respect to the sale, purchase, or use of such property, to the extent of the amount of such tax properly due and paid in such other state. See subsection (a)(3) of the enclosed copy of 86 Ill. Adm. Code 150.310.

If subcontractors are utilized and are acting as construction contractors, the transaction between the general contractors and the subcontractors is not a taxable transaction. The subcontractors incur Use Tax liability on any tangible personal property that they purchase for incorporation into real estate. If, however, general contractors make purchases and then contract to have subcontractors do the installation, the general contractors incur Use Tax liability because they are making the purchases of such tangible personal property.

It is important to note that since construction contractors are the end users of the materials that they permanently affix to real estate, their customers incur no Use Tax liability and the construction contractors have no legal authority to collect the Use Tax from their customers. However, many construction contractors pass on the amount of their Use Tax liabilities to customers in the form of higher prices or by including provisions in their contracts that require customers to "reimburse" the construction contractor for his or her tax liability. Please note that this reimbursement cannot be billed to a customer as "sales tax," but can be listed on a bill as a reimbursement of tax. The choice of whether a construction contractor requires a tax reimbursement from the customer or merely raises his or her price is a business decision on the construction contractor's part.

Illinois Retailers' Occupation and Use Taxes do not apply to sales of service that do not involve the transfer of tangible personal property to customers. However, if tangible personal property is transferred incident to sales of service, this will result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon which tax base the servicemen choose to calculate their tax liability. For your general information we are enclosing a copy of 86 Ill. Adm. Code 140.101 regarding sales of service and Service Occupation Tax.

Under the Service Occupation Tax Act, businesses providing services (i.e., servicemen) are taxed on tangible personal property transferred as an incident to sales of service. See the enclosed copy of 86 Ill. Adm. Code 140.101. The purchase of tangible personal property that is transferred to the service customer may result in either Service Occupation Tax liability or Use Tax liability for the servicemen depending upon which tax base the servicemen choose to calculate their tax liability. The servicemen may calculate their tax base in one of four ways: (1) separately stated selling price of tangible personal property transferred incident to service; (2) 50% of the servicemen's entire bill; (3) Service Occupation Tax on the servicemen's cost price if the servicemen are registered de minimis servicemen; or (4) Use Tax on the servicemen's cost price if the servicemen are de minimis and are not otherwise required to be registered under Section 2a of the Retailers' Occupation Tax Act. Please note that application of Service Occupation Tax is very fact specific and you may want to review some of the Department's Sunshine Letters on this topic that are located on the Department's website located at www.revenue.state.il.us under the topic of "Legal Information."

If an out-of-State contractor also makes retail ("over-the-counter") sales to Illinois customers without installation, that contractor may be required to register and collect Use Tax (6.25%) on those sales if the contractor has sufficient nexus. The following information outlines the principles of nexus. We hope it is helpful to you in determining whether the company referenced in your letter is responsible to pay sales and use taxes in Illinois.

An "Illinois Retailer" is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding

Use Tax incurred by the purchasers. Local taxes may apply. For a list of the current tax rates including local sales taxes that are collected by the Illinois Department of Revenue, please see the Department's Sales Tax Rate Reference Manual that is located on the Department's Web site at www.revenue.state.il.us under the heading, "Tax Information - Sales and Related Taxes and Credits." If the company does not accept purchase orders in Illinois or maintain an inventory in Illinois and fill Illinois orders from that inventory, the company is not an Illinois retailer.

Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a "retailer maintaining a place of business in Illinois" is described in the enclosed copy of 86 Ill. Adm. Code 150.201. This type of retailer is required to register with the State as an Illinois Use Tax collector. See the enclosed copy of 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability. Determining whether a retailer is maintaining a place of business in Illinois is extremely fact specific. The Department cannot make such a complex ruling with the type of limited information that is provided in requests for General Information Letters or Private Letter Rulings.

The United States Supreme Court in Quill Corp. v. North Dakota, 112 S.Ct 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Cause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. Quill at 1910.

The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Subcontractors in Illinois are generally considered representatives of general contractors for purposes of determining physical presence for tax purposes.

The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax on the purchase of the out-of-State goods and have a duty to self-assess their Use Tax liability and remit the amount directly to the State. The State Use Tax rate is 6.25%.

For answers to specific questions listed in your letter, please refer below to the specific question number.

Question 1:

Please see the above analysis regarding leasing, the providing of service, and the tax liability of construction contractors.

Question 2:

Section 3 of the Illinois Use Tax Act (35 ILCS 105/3) imposes a tax upon the privilege of using tangible personal property in Illinois purchased at retail from retailers. The Illinois Use Tax Act,

however, provides that in order to prevent actual or likely multistate taxation, the Use Tax does not apply to the use of tangible personal property in this State of tangible personal property that is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another State in respect to the sale, purchase, or use of that property, to the extent of the amount of the tax properly due and paid in the other State, 35 ILCS 105/3-55(d). See subsection (a)(3) of the enclosed copy of 86 Ill. Adm. Code 150.310.

Question 3:

As noted in the answer to Question number 2 above, Illinois imposes a tax upon the privilege of using tangible personal property in Illinois purchased at retail from retailers. We cannot provide you with a specific answer in the context of a General Information Letter whether Illinois will provide a credit for STATE's lease tax against any Illinois Use Tax incurred on the use of that same property in Illinois. Generally, if STATE's lease tax is a tax on the sale, purchase, or use of tangible personal property, then the amount of that tax that was properly due and paid to the State of Wisconsin may be credited against any Illinois Use Tax liability incurred on that same tangible personal property.

If the tangible personal property was purchased outside of this State and used outside of this State prior to being brought into this State for use, the selling price upon which the Illinois Use Tax is computed is reduced by an amount representing a reasonable allowance for depreciation for the period of such out-of-State use. See the enclosed copy of 86 Ill. Adm. Code 150.105.

Question 4:

Determinations of nexus for sales and use taxes are very fact specific and will not be addressed in either a General Information Letter or Private Letter Ruling. Please see the above for a general description of sales and use tax nexus. The Income Tax Division of our office will be answering your question regarding corporation taxes in a separate letter.

Question 5:

The Income Tax Division of our office will be answering your question regarding the withholding of Illinois income taxes in a separate letter.

I hope this information is helpful. The Department of Revenue maintains a website, which can be accessed at www.revenue.state.il.us. If you have further questions related to the Illinois sales tax laws, please contact the Department's Taxpayer Information Division at (217) 782-3336.

If you are not under audit and you wish to obtain a binding Private Letter Ruling regarding your factual situation, please submit all of the information set out in items 1 through 8 of Section 1200.110(b) described above.

Very truly yours,

Terry D. Charlton
Associate Counsel

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